

(ii) A requester has previously failed to pay a fee charged in a timely fashion, the Commission will require the requester to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Commission will begin the process a new request or a pending request from that requester.

(iii) When the Commission requires advance payment under this paragraph, the administrative time limits prescribed in this part will begin only after the Commission has received the fee payments described above.

(6) *Fee reduction or waiver.* (i) Any fee described in paragraph (b) of this section may be reduced or waived if the requester demonstrates that disclosure of the information sought is:

(A) In the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(B) Not primarily in the commercial interest of the requester.

(ii) The Commission will consider the following criteria to determine the public interest standard:

(A) Whether the subject of the requested records concerns the operations or activities of the government;

(B) Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(C) Whether disclosure of the requested information will contribute to public understanding; and

(D) Whether the disclosure is likely to contribute significantly to public understanding of government operations or facilities.

(iii) The Commission will consider the following criteria to determine the commercial interest of the requester:

(A) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(B) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(iv) This request for fee reduction or waiver must accompany the initial re-

quest for records and will be decided under the same procedures used for record requests.

(7) *Debt collection.* The Commission will use the authorities mandated in the Debt Collection Act of 1982, 31 U.S.C. 3711, 3716-3719 (1982), including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage payment of outstanding unpaid FOIA invoices.

(8) *Annual adjustment of fees—(i) Update and publication.* The Commission, by its designee, the Executive Director, will update the fees established in this section each fiscal year. The Executive Director will publish the fees in the FEDERAL REGISTER.

(ii) *Payment of updated fees.* The fee applicable to a particular Freedom of Information Act request will be the fee in effect on the date that the request is received.

**§388.110 Procedure for appeal of denial of requests for Commission records not publicly available or not available through the Public Reference Room and denial of requests for fee waiver or reduction.**

(a)(1) A person whose request for records or request for fee waiver or reduction is denied in whole or part may appeal that determination to the General Counsel or General Counsel's designee within 45 days of the determination. Appeals filed pursuant to this section must be in writing, addressed to the General Counsel of the Commission, and clearly marked "Freedom of Information Act Appeal." Such an appeal received by the Commission not addressed and marked as indicated in this paragraph will be so addressed and marked by Commission personnel as soon as it is properly identified and then will be forwarded to the General Counsel. Appeals taken pursuant to this paragraph will be considered to be received upon actual receipt by the General Counsel.

(2) The General Counsel or the General Counsel's designee will make a determination with respect to any appeal within 20 working days after the receipt of such appeal. If, on appeal, the denial of the request for records or fee reduction is in whole or in part upheld, the General Counsel or the General

Counsel's designee will notify the person making such request of the provisions for judicial review of that determination.

(b) In unusual circumstances, the time limits prescribed for making the initial determination pursuant to § 388.108 and for deciding an appeal pursuant to this section may be extended by up to 10 working days, by the Secretary who will send written notice to the requester setting forth the reasons for such extension and the date on which a determination or appeal is expected to be dispatched. *Unusual circumstances* means:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the requests;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultation, which will be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

**§ 388.111 Procedures in event of subpoena.**

(a)(1) The procedures specified in this section will apply to all subpoenas directed to Commission employees that relate in any way to the employees' official duties. These procedures will also apply to subpoenas directed to former Commission employees if the subpoenas seek nonpublic materials or information acquired during Commission employment. The provisions of paragraph (c) of this section will also apply to subpoenas directed to the Commission.

(2) For purposes of this section,

(i) *Employees*, except where otherwise specified, includes "special government employees" and other Commission employees; and

(ii) *Nonpublic* includes any material or information which is exempt from availability for public inspection and copying;

(iii) *Special government employees* includes consultants and other employees as defined by section 202 of Title 18 of the United States Code.

(iv) *Subpoena* means any compulsory process in a case or matter, including a case or matter to which the Commission is not a party;

(b) Any employee who is served with a subpoena must promptly advise the General Counsel of the Commission of the service of the subpoena, the nature of the documents or information sought, and all relevant facts and circumstances. Any former employee who is served with a subpoena that concerns nonpublic information shall promptly advise the General Counsel of the Commission of the service of the subpoena, the nature of the documents or information sought, and all relevant facts and circumstances.

(c) A party causing a subpoena to be issued to the Commission or any employee or former employee of the Commission must furnish a statement to the General Counsel of the Commission. This statement must set forth the party's interest in the case or matter, the relevance of the desired testimony or documents, and a discussion of whether the desired testimony or documents are reasonably available from other sources. If testimony is desired, the statement must also contain a general summary of the testimony and a discussion of whether Commission records could be produced and used in lieu of testimony. Any authorization for testimony will be limited to the scope of the demand as summarized in such statement.

(d) Commission records or information which are not part of the public record will be produced only upon authorization by the Commission.

(e) The Commission or its designee will consider and act upon subpoenas under this section with due regard for statutory restrictions, the Commission's Rules of Practice and Procedure, and the public interest, taking into account factors such as applicable privileges including the deliberative process privilege; the need to conserve the time of employees for conducting official business; the need to avoid spending the time and money of the United States for private purposes; the need to